NO. 47255-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ASKIA WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

DAVID DONNAN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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2. The trial court erred in finding the stop was not a seizure.

3. The deputy prosecutor's closing argument misstated the law in violation of a defendant's Sixth and Fourteenth Amendments and article I, section 22 right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, Section 7 protects against the disturbance of private affairs without lawful authority. Warrantless searches and seizures are prohibited, and this rule is subject to a few narrowly drawn and jealously guarded exceptions. Here, Mr. Williams was stopped and questioned by several armed, uniformed police officers. Did this intrusion constitute a seizure?

2. A social contact may escalate into a seizure based upon subsequent developments, causing a reasonable person to feel he is no longer free to leave. Did Deputy Stewart's approach from behind, followed by surrounding Mr. Williams with officers, and then asking for

Mr. Williams's name and birth date indicate the stop had escalated from a social contact to a seizure under Article I, Section 7?

3. A prosecutor violates the Sixth and Fourteenth Amendments and the article I, section 22 due process right to a fair trial when he misstates the law and endeavors to relieve the State of its burden of proving each element of an offense. The deputy prosecutor made statements to the jury indicating that it did not matter whether Mr. Williams knew he possessed a firearm. Did the State's misconduct violate the Sixth and Fourteenth Amendments and article I, section 22 due process right to a fair trial?

C. STATEMENT OF THE CASE

On a beautiful October mid-day, Askia Williams, a middle-aged black man, stood alone in a public space, commenting to himself aloud about the scenery. Feb 4, 2015 RP 112. Suddenly a fully marked Crown Victoria police cruiser coming down a nearby street pulled an unexpected U-turn and parked abruptly on the sidewalk behind Mr. Williams. Feb 3, 2015 RP 10, 23; Feb 4, 2015 RP 70. An officer exited the vehicle, approached Mr. Williams from behind and attempted to make verbal contact. Feb 3, 2015 RP 23. Mr. Williams put his hands on

his head and began politely cooperating with the officer. Feb 3, 2015 RP 11, 13, 23.

Multiple officers surrounded Mr. Williams as he continued to stand, hands on head, calmly interacting and answering the officers' questions. Feb 3, 2015 RP 24. Deputy Stewart verified that he was not alone at the scene, claiming that, at one point, Mr. Williams pointed at a passerby and identified her as his ex-wife and an FBI agent; another deputy went to speak with the woman and confirmed her non-involvement. Feb 4, 2015 RP 72.

The officers had been dispatched to respond to a telephone tip regarding a man talking to himself with a gun on his hip. Feb 3, 2015 RP 10. Deputy Stewart testified that he needed to investigate what was going on, that even if Mr. Williams had not been so cooperative he would have needed to go ahead with his investigation, and that he needed to find out what Mr. Williams was up to, given the circumstances. Feb 3, 2015 RP 17-19.

Deputy Stewart testified that at the time he exited his patrol vehicle, Mr. Williams was "very calm" and "not alerting to me." Feb 4, 2015 RP 72. When asked why he did not arrest Mr. Williams right away, Deputy Stewart replied, "Because Washington State is an open-

carry state, and there's nothing against the law with what he was doing." Feb 3, 2015 RP 20. During the duration of the interaction, Mr. Williams was non-threatening, calm, and compliant; did not appear drunk or otherwise intoxicated; was not "rambling about nonsense"; and did not appear "out of it." Feb 4, 2015 RP 72-73.

After Deputy Stewart asked Mr. Williams for his name and birth date, Mr. Williams, hands on head, responded with the requested information and also stated that he was a convicted felon. Feb 3, 2015 RP 12. Deputy Stewart testified that Mr. Williams did not make any statements regarding the nature of the item on his hip "at first." Feb 4, 2015 RP 73. After checking through South Sound 911 records and confirming a felony history, Deputy Stewart officially detained Mr. Williams, asked him to place his hands behind his back, and handcuffed him applying handcuffs. Feb 3, 2015 RP 13. Then the deputy ran a second search through South Sound 911 records to determine the nature of the prior felony. Feb 3, 2015 RP 13.

With Mr. Williams in handcuffs, the deputy seized the holster and gun, as well as Mr. Williams's backpack. Feb 4, 2015 RP 75. The deputy asked Mr. Williams where he obtained the pistol, and Mr. Williams explained that he bought it at EZ-Pawn, "off the 9600 block

of Pac Avenue," and that there was a receipt in his pocket. Feb 3, 2015 RP 13. The deputy asked if he could remove the receipt from Mr. Williams's pocket, and Mr. Williams consented. Feb 3, 2015 RP 13. (receipt identifies EZ Loan, 9616 Pacific Avenue. Feb 4, 2015 RP 76.)

Deputy Stewart assessed the gun and looked up the RCW related to firearm possession. The deputy testified that the gun fit the requirements laid out in the statute, "so we went to jail for that." Feb 3, 2015 RP 13. Mr. Williams made no statements after being read his *Miranda*[1] rights. Feb 3, 2015 RP 16.

Mr. Williams testified that he fancies Civil War history and Civil War antiques, and that he believed the item he had purchased was a nonfunctional replica of a Civil War antique revolver. Feb 4, 2015 RP 109-11. Mr. Williams testified he believed he had loaded synthetic materials simulating ammunition. Feb 4, 2015 RP 116. He testified he believed the pawn shop was required to run a background check before selling him a firearm, and that the ease with which he purchased the gun indicated he was acquiring a mere replica. Feb 4, 2015 RP 110.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct 1602, 16 L.Ed.2d 694 (1966).

The prosecution presented officer and forensic testimony indicating the gun was loaded and did properly fire when tested at a range. Feb 4, 2015 RP 84-85, 104. However, the forensic specialist testified he had no knowledge of whether the materials originally placed in the gun chambers would have rendered the gun operable. Feb 4, 2015 RP 105.

During rebuttal argument, the deputy prosecutor implied there was no mens rea required to convict a defendant of unlawful possession of a firearm. Feb 4, 2015 RP 139. Despite a timely objection and the court's direction to correct this misstatement of the law, the State failed to do so. Feb 4, 2015 RP 139-42.

Mr. Williams was convicted of unlawful possession of a firearm.

D. ARGUMENT

1. THE COURT ERRED IN DENYING MR. WILLIAMS'S MOTION TO SUPPRESS, AS THE WARRANTLESS SEARCH AND SEIZURE VIOLATED ARTICLE I, SECTION 7

a. Constitutional principles prohibit unreasonable searches and seizures

The state and federal constitutions protect citizens from unlawful searches and seizures. U.S. Const. amend. 4; Const. art. I, § 7. The Fourth Amendment of the United States Constitution, made

applicable to the states through the Fourteenth Amendment, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no warrants shall issue, but upon probable cause." U.S. Const. amend. 4; U.S. Const. amend. 14; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Under the Washington Constitution, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7.

Washington courts have long recognized that article I, section 7 provides even greater protections to citizens' privacy rights than those afforded by the Fourth Amendment of the federal constitution. See, e.g., State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); State v. O'Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003); State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). The Washington provision "is not limited to subjective expectations of privacy, but, more broadly protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999) (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

A warrantless search or seizure is generally considered per se unreasonable. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Thus, a warrantless search is presumed unlawful unless the search meets one of the "narrowly drawn and jealously guarded" exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the burden of demonstrating whether a search or seizure fits within one of these exceptions. Id. (citing State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)).

In the instant case, the trial court characterized the interaction between Deputy Stewart and Mr. Williams as a social contact. CP 52.

b. The warrantless search of Mr. Williams was a seizure -- not a social contact

A social contact, under Washington law,

> occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., Terry stop)." See generally Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

Every interaction between police officers and individuals does not rise to the level of a seizure, and effective law enforcement techniques may require interaction with citizens on the streets. Harrington, 167 Wn.2d at 665. However, subsequent police conduct may escalate an interaction that began as a social contact into a seizure. Id. at 666; State v. Soto-Garcia, 68 Wn. App. 20, 22, 841 P.2d 1271 (1992), abrogated on other grounds by State v. Thorn, 129 Wn.2d 347, 917 P.2d 108 (1996).

In Harrington, the defendant was stopped by one police officer who did not activate his emergency lights or siren, parked his car out of sight, approached Harrington from the front, and asked for permission to speak to Harrington; this initial approach was deemed a social contact. 167 Wn.2d at 665. The Court held that subsequent events "quickly dispelled the social contact, however, and escalated the encounter to a seizure." Id. at 666. The factors that a court may consider when determining whether a seizure has occurred include, but are not limited to, the arrival of additional police officers; the request to remove hands from ones pockets; the display of a weapon; the request to search or frisk; and the request for identification. Id. at 667-68; State v. Young, 135 Wn.2d 498, 512, 957, P.2d 681 (1998) (embracing

nonexclusive list of police actions likely resulting in seizure) (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

Police actions which may meet constitutional muster when viewed individually may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively. Id. at 668; Soto-Garcia, 68 Wn. App. at 22.

Here, in accordance with Harrington and Soto-Garcia, the deputies had no right to barge so intrusively into Mr. Williams's life. Whatever may have been said during the telephone tip regarding Mr. Williams's seemingly unusual behavior, there was no reason to suspect that Mr. Williams was dangerous or committing a crime once the deputy saw Mr. Williams calmly standing alone. Feb 3, 2015 RP 17. Deputy Stewart testified that at the time he exited his patrol vehicle, Mr. Williams was "very calm" and "not alerting to me." Feb 4, 2015 RP 72. Furthermore, "there's nothing against the law with what he was doing." Feb 3, 2015 RP 20.

Only the introductory moments, if any, of the initial contact between Deputy Stewart and Mr. Williams could be characterized as a social interaction. Even a "hello" can be threatening to a reasonable

person when coming from an officer who pulls a quick U-turn, hastily parks on the sidewalk, and approaches a citizen from behind. Feb 3, 2015 RP 23. Next, Mr. Williams was quickly and completely surrounded by multiple police officers. Feb 3, 2015 RP 24. Finally, in this environment, standing with his hands on his head and surrounded by officers, Mr. Williams was asked for his name and birth date. Feb 3, 2015 RP 12. It is certainly unlikely that Mr. Williams thought -- or that any reasonable person would think -- that Deputy Stewart was making this inquiry for anything other than a search for a criminal purpose.

As the Supreme Court held in Harrington, a reasonable person would not have felt free to leave at this point, or indeed, free to refuse to respond to the officers. 167 Wn.2d at 670. The interference with Mr. Williams's privacy here mirrors that in Harrington, where the Court stated:

> We note this progressive intrusion, culminating in seizure, runs afoul of the language, purpose, and protections of article I, section 7. Our constitution protects against disturbance of private affairs – a broad concept that encapsulates searches and seizures. Article I, section 7 demands a different approach than does the Fourth Amendment; we look for the forest amongst the trees.

167 Wn.2d at 670.

As in Harrington and Soto-Garcia, although an initial "hello" may have been social, the officers escalated the contact into a seizure, negating the element of consent.[2] Harrington, 167 Wn.2d at 670; Soto-Garcia, 68 Wn. App. at 29.

c. Mr. Williams was searched in violation of Article I, section 7, requiring suppression of the evidence and reversal of his conviction

Where police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government's illegality. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009) ("The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.").

Even if the State were to categorize the later portions of the stop as a Terry detention, it is inappropriate to conduct a search beyond a basic safety frisk for weapons. Id. at 249. Deputy Stewart had no genuine safety concern once Mr. Williams was placed in handcuffs, and thus fishing through his pockets for a receipt was beyond the scope of a

[2] See also David K. Kessler, Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard, 99 J.Crim. L. & Criminology 51 (2009) (noting "people feel compelled to comply with authority figures," and "most people would not feel free to leave when they are questioned by a police officer on the street").

safety frisk. See Harrington, 167 Wn.2d at 670 (on negating element of consent); Kessler, Free to Leave? supra at n.2.

The warrantless seizure and search of Mr. Williams violated article I, section 7. Mr. Williams was unlawfully seized when he was surrounded by multiple officers while standing with his hands on his head and officers began asking him official identifying questions regarding his name and birth date. Any supposed consent to search was obtained through the exploitation of an illegal seizure, and exclusion of the evidence and reversal of his conviction is required.

2. THE DEPUTY PROSECUTOR'S MISCONDUCT IN CLOSING REQUIRES REVERSAL OF MR. WILLIAMS'S CONVICTION.

a. The deputy prosecutor misstated the law regarding knowledge

In the State's closing rebuttal argument, the prosecutor posed a series of rhetorical questions:

> What does a background check have to do with whether a defendant knowingly had a firearm or not?
>
> Replica of a civil war piece, so what?
>
> October 11 through the 25th did the gun fire? Who cares?

Feb 4, 2015 RP 138-39.

The prosecutor punctuated this list with this conclusion:

> What's before you is that the defendant had a firearm. Period.

Feb 4, 2015 RP 139.

Defense counsel timely objected to this misstatement of the knowledge element of the statute, and the judge asked the prosecutor to correct the misstatement of the law. Feb 4, 2015 RP 139. The prosecutor directed the jury to read the jury instructions, and asked "Is it reasonable that the defendant knew that he had a firearm?" Feb 4, 2015 RP 139. The judge did not issue a clarifying instruction to the jury regarding the knowingly standard. Feb 4, 2015 RP 139-42.

b. The State had to prove Mr. Williams knew he was carrying a firearm.

The Supreme Court of Washington has provided clear guidance regarding the knowledge requirement as related to unlawful possession of a firearm:

> RCW 9.41.040 prohibits convicted felons from possessing firearms. In Anderson,[3] this court relied on the test from Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), adopted by this court in State v. Bash, 130 Wn.2d 594, 925 P.2d 978 (1996), in finding that the legislature did not intend second degree unlawful possession of a firearm to be a strict liability crime.

[3] State v. Anderson, 141 Wn.2d 363, 364, 5 P.3d 1247 (2000).

State v. Williams, 158 Wn.2d 904, 909, 148 P.3d 993 (2006). The Court was concerned that defendants understand the actual nature of the item in their possession, including machine guns, because in some circumstances,

> such items can be owned and possessed perfectly innocently. It seems clear to us that if the State is not required to prove knowing possession of a firearm there is a distinct possibility that entirely innocent behavior would fall within the sweep of this statute.

Anderson, 141 Wn.2d at 364.

The knowledge standard is based on the subjective understanding of the individual defendant. RCW 9A.08.010(1) defines "knowledge" as:

> (b) . . . . A person knows or acts knowingly or with knowledge when:
> (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

The Supreme Court has made clear that the language contained in RCW 9A.08.010(1)(b)(ii) regarding a reasonable person is not an alternative definition of knowledge. State v. Shipp, 93 Wn.2d 510, 514-15, 610 P.2d 1322 (1980). This provision instead

> permits but does not require the jury to infer actual, subjective knowledge if the defendant has information that would lead a reasonable person in the same situation to believe that facts exist that are described by law as being a crime.

State v. Vanoli, 86 Wn. App. 643, 648, 937 P.2d 1166 (1997); Shipp, 93 Wn.2d at 516.

Shipp recognized there were three potential readings of RCW 9A.08.010(1)(b)(ii). First, an instruction mirroring the language of the statute could permit a juror to conclude that if a reasonable person might have known of a fact, the juror was required to find the defendant had knowledge. 93 Wn.2d at 514. Second, a juror could conclude the statute redefined "knowledge" to include "negligent ignorance." Id. Finally, a juror instructed in the language of the statute could conclude the statute requires he find the defendant had actual knowledge, "and that he is permitted, but not required, to find such knowledge if he finds that the defendant had 'information which would lead a reasonable man in the same situation to believe that (the relevant) facts exist.'" Id.

Addressing each of these alternatives in turn, Shipp found the first "clearly unconstitutional" as it creates a mandatory presumption. 93 Wn.2d at 515. The Court deemed the second alternative unconstitutional as well, as defining knowledge in a manner so contrary

to its ordinary meaning deprived people of notice of which conduct was criminalized. Id. 515-16. In resting upon the third interpretation as the only constitutionally permissible reading, the Supreme Court said "[t]he jury must still be allowed to conclude that he was less attentive or intelligent than the ordinary person." Id. at 516. Thus, the "jury must still find subjective knowledge." Id. at 517.

c. Improper and misleading argument by prosecutors deprives a defendant of his due process right to a fair trial.

The Sixth and Fourteenth Amendments and article I, section 22 guarantee the right to a fair trial. In re Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). A prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

d. The trial court failed to correct the misstatement of the law, and it was not Mr. Williams's burden to request such a curative instruction.

A trial judge's firm corrective instruction can cure some instances of prosecutorial misconduct. See State v. Warren, 165 Wn.2d. 17, 28, 195 P.3d 940 (2008). However, a defendant who timely objects to a misstatement made during closing arguments is not required to request a curative instruction. State v. Allen, 182 Wn.2d 364, 380, 341 P.3d 268 (2015).

e. The prosecutor's improper and misleading argument deprived Mr. Williams of his constitutional rights, requiring a new trial.

The State's improper and prejudicial argument invariably affected the jury's understanding of what was required to convict Mr. Williams. At the close of the defense argument, the jurors were beginning to mentally weigh whether Mr. Williams subjectively understood what he had purchased and what he thought he was carrying on his person. As a representative of the State, the prosecutor's questions regarding whether it matters that the defendant understand what he possessed, and the trial court's failure to clarify the issue for the jury, impacted the jury's impression of whether the requirement

stopped at what a reasonable person would know, as compared to what Mr. Williams actually, subjectively knew.

"[D]eciding whether a prosecuting attorney commits prejudicial misconduct 'is not a matter of whether there is sufficient evidence to justify upholding the verdicts.'" Allen, 182 Wn.2d at 376 (quoting Glasmann, 175 Wn.2d at 711. Even in the event that the State presents evidence that the defendant knowingly possessed a firearm, if the State fails to acknowledge the "knowingly" requirement or argues to the jury that the defendant must show lack of knowledge, the State shirks its responsibility to prove an essential element of the crime, and the matter must be remanded for a new trial. See Anderson, 141 Wn.2d at 366. Despite the State's evidence that officers found a gun on Mr. Williams's person, by implying that Mr. Williams's state of mind was irrelevant, the State muddied the waters, impacting Williams's right to a fair trial.

Where a prosecutor proffers improper argument which does not necessarily violate the defendant's constitutional rights, the defendant bears the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. See, e.g., State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (defendant bore burden of proving prejudice

where prosecutor committed misconduct by violating evidentiary ruling); State v. Jones, 144 Wn. App. 284, 300, 183 P.3d 307 (2008) (defendant bore burden of proving prejudice where prosecutor committed misconduct by bolstering witness's credibility and arguing facts not in evidence).

But where a prosecutor violates a defendant's constitutional rights, reversal is required unless the *State* proves beyond a reasonable doubt the misconduct did not contribute to the verdict obtained. See, e.g., Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendants' exercise of constitutional right to silence); Monday, 171 Wn.2d at 680 (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor engaged in racial stereotyping in violation of constitutional right to impartial jury); State v. Moreno, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendant's exercise of his constitutional right to proceed pro se).

Here, the prosecutor's improper argument minimized the State's burden of proving a key element of the charge against Mr. Williams, in

violation of his constitutional rights. The misstatement of the law requires reversal of Mr. Williams's conviction.

E. CONCLUSION

For the foregoing reasons, Mr. Williams respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 31st day of August, 2015.

Respectfully submitted,

s/ Jan Trasen (41177) for

DAVID DONNAN (WSBA 19271)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. ASKIA WILLIAMS, Appellant.	)))))))))	NO. 47255-4-II

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